

## **DRAFT-revised 8/9/18**

### MTC Uniformity Committee Marketplace Facilitator Work Group Issues List

Date: August 9, 2018

Objective: Develop and discuss concepts or ideas for consideration by states desiring to require marketplace facilitators to collect and remit sales/use tax on marketplace sales, in order to maximize compliance while minimizing the burden on marketplace facilitators and marketplace sellers.

#### **Background**

Growth in the volume of online sales facilitated through a marketplace continues to accelerate. Online marketplace sellers number in the millions, although most are quite small.

In order to increase sales/use tax collection compliance levels, several states are imposing requirements on marketplace facilitators to collect and remit the sales/use tax on marketplace sales. Following the *Wayfair* decision, more states are likely to increase this trend. The following states have enacted legislation requiring marketplace facilitators to collect and remit sales/use tax on marketplace sales, or giving marketplace facilitators the option to collect and remit tax or comply with notice and reporting requirements:

Minnesota (2017 HF 1, >\$10,000 sales, collect eff. 10/1/18)

Washington (2017 HB 2163, >≡\$10,000 [gross receipts from retail sales](#), option to collect or notice/report (eff. 1/1/18); [>\\$100,000 gross retail sales or 200+ separate transactions, remote sellers must collect on all non-marketplace sales, and marketplace facilitators must collect on own sales and sales by all marketplace sellers through marketplace \(eff. 10/1/18\); for remote sellers and marketplace facilitators \\$10,000 and at or below \\$100,000 of sales, they must make an election to do notice and reporting or collect](#))

Rhode Island (2017 H 5175A, >\$100,000 sales or 200 or more separate transactions, option to collect or notice/report eff. 6/27/17)

Pennsylvania (2017 Act 43, \$10,000 sales, option to collect or notice/report eff. 4/1/18)

Alabama (2018 HB 470, \$250,000 sales, option to collect or notice/report eff. 1/1/19)

Oklahoma (2018 HB 1019XX, \$10,000 sales, option to collect or notice/report eff. 7/1/18)

Iowa (2018 SF 2417, \$100,000 sales or 200 separate transactions, collect eff. 7/1/19)

Connecticut (2018 SB 417, \$250,000 and 200 separate transactions, collect eff. 12/1/18)

New Jersey (2018 A4261, collect eff. 10/1/18)

## Issues

### 1. Should there be common definitions for the terms such as “marketplace,” “marketplace seller,” “marketplace facilitator,” “referral,” and “referrer,” or equivalent terms?

Example definitions are provided below as a starting point for discussion.

**“Marketplace”** or “forum” (example—Connecticut definition of “forum”): a physical or electronic place, including, but not limited to, a store, a booth, an Internet web site, a catalog or a dedicated sales software application, where tangible personal property or taxable services are offered for sale.

**“Marketplace seller”** (example--Connecticut): any person who has an agreement with a marketplace facilitator regarding retail sales of such person, whether or not such person is required to obtain a permit . . .

The “marketplace facilitator” definitions enacted in various states to date vary between narrow and broad.

**“Marketplace facilitator”** (narrow definition example—Connecticut): any person who (A) facilitates retail sales of at least two hundred fifty thousand dollars during the prior twelve-month period by marketplace sellers by providing a forum that lists or advertises tangible personal property subject to tax . . . or taxable services, including

**Commented [HD(1)]:** WA does not have a definition of marketplace but WA DOR would not be opposed to one; we do have a definition of “platform” in RCW 82.13.010(5) meaning “an electronic or physical medium, including a web site or catalog, operated by a referrer.” So there is no specific definition for a marketplace facilitator marketplace, and this would be useful to have (although we have not received any ruling requests or other questions on this issue, so it has not been a cause of much concern as far as we know).

**Commented [HD(2)]:** Do we include sales through a referrer? In WA, RCW 82.13.010(4) provides: “Marketplace seller” means a seller that makes retail sales through any physical or electronic marketplaces operated by a marketplace facilitator or directly resulting from a referral by a referrer, regardless of whether the seller is required to be registered with the department as provided in RCW 82.32.030.

digital goods, for sale by such marketplace sellers, (B) directly or indirectly through agreements or arrangements with third parties, collects receipts from the customer and remits payments to the marketplace sellers, and (C) receives compensation or other consideration for such services.

**“Marketplace facilitator”** (broad definition example--Washington): a business that does the following three activities:

1. Facilitates the sale of a marketplace seller’s product through a marketplace for payment.
2. Engages, directly or indirectly, in **any** of the following with respect to bringing the buyer and seller together:
  - Transmitting or otherwise communicating the offer or acceptance between the buyer and seller
  - Owning or operating the infrastructure, electronic or physical, or technology that brings buyers and sellers together
  - Providing a virtual currency that buyers can use to purchase products from the seller
  - Software development or research and development activities related to any activities with respect to the seller’s products listed below, if such activities are directly related to a marketplace operated by the person or an affiliated person.
3. Does **any** of the following activities with respect to the seller's products:
  - Payment processing services
  - Fulfillment or storage services
  - Listing products for sale
  - Setting prices
  - Branding sales as those of the marketplace facilitator
  - Order taking
  - Advertising or promotion
  - Providing customer service or accepting or assisting with returns or exchanges

A marketplace facilitator facilitates sales of a seller’s products through a marketplace and engages in other specified activities as provided by the law and outlined above. Websites that merely advertise goods for sale and do not handle transactions do not meet the definition of a marketplace facilitator.

Note: States using a narrow definition of “marketplace facilitator” limit the definition to include the person handling the customer’s payment. The broader definition does not have that limitation. This raises the question, if the marketplace facilitator is going to be required to collect and remit the sales/use tax, how can that be accomplished if the marketplace facilitator is not handling the customer’s payment? Also, how can the marketplace facilitator properly report the transaction on a return if it does not have all the relevant information concerning the sale?

**Commented [HD(3):** Under a narrow definition of facilitator, there is chance for a business to argue that because it does not process the payment, then it is not the facilitator. That business can then also argue that because it does not refer a customer by a link to a seller it is not a referrer (that is because the entity in question completes the sale on its own site so does not have to link the person to the seller’s site to complete the sale). The broader definition avoids this definitional no-man’s land.

**Commented [HD(4):** In WA, what we have seen from facilitators that use PayPal to process the transaction rather than their own payment processing service, they still have the relevant information needed to comply. In fact, some have it structured so that PayPal collects the sales tax on the transaction and remits it to the facilitator, who then remits the tax to the Department.

WA’s distinction between referrers and facilitators is not based on who collects payment, but rather, who handles the transaction between the buyer and seller. If a buyer goes on a facilitator’s website, it can complete the transaction on that website, and the facilitator has full knowledge of whether or not a transaction occurred, and where to source the sale.

In contrast, a referrer does not know whether a transaction occurred after the potential buyer clicks to the link to the remote seller’s website. It would be difficult, if not impossible, for a referrer to collect tax in that instance. In effect, a referrer does not really have a choice to collect so must comply with notice and reporting requirements. Those notice and reporting requirements are markedly different than those for facilitators, however, because a referrer does not know whether a transaction takes place. Thus, a referrer’s annual notices aren’t to the buyer, as with facilitators, but to the Department and to remote sellers to whom it referred a potential customer.

**"Referral"** (example—Connecticut): the transfer by a referrer of a potential purchaser to a seller who advertises or lists tangible personal property for sale on or in the referrer's medium.

**"Referrer"** (example--Connecticut): any person who (A) contracts or otherwise agrees with a seller to list or advertise for sale one or more items of tangible personal property by any means, including an Internet web site and a catalog, provided such listing or advertisement includes the seller's shipping terms or a statement of whether the seller collects sales tax, (B) offers a comparison of similar products offered by multiple sellers, (C) receives commissions, fees or other consideration in excess of one hundred twenty-five thousand dollars during the prior twelve-month period from a seller or sellers for such listings or advertisements, (D) refers, via telephone, Internet web site link or other means, a potential customer to a seller or an affiliated person of a seller . . . , and (E) does not collect payments from the customer for the seller. For

**Commented [HD(5):** We like this part of the definition and it would help to have it in ours, because we believe the intent of including referrers was to achieve so-called “platform neutrality.” That is, a referrer is a direct competitor of a facilitator in the sense that it provides a list of potential sellers to buy from directly, similar to a facilitator’s site (except the facilitator handles the transaction whereas the referrer does not).

purposes of this subdivision, "shipping terms" does not mean a seller's mere mention of general shipping costs in the seller's own listing or advertisement.

**"Referrer"** (example—Washington): a person that meets all of the following conditions:

1. Contracts or otherwise agrees with a seller to list or advertise for sale one or more items in any medium, including a website or catalog
2. Receives a commission, fee, or other consideration from the seller for the listing or advertisement
3. Transfers, via telephone, internet link, or other means, a purchaser to a seller or an affiliated person to complete the sale
4. Does not collect receipts from the purchasers for the transaction

The definition of "referrer" does not include a person that:

- Is engaged in the business of printing a newspaper or publishing a newspaper
- . . .
- Provides internet advertising services and does not ever provide either
  - The marketplace seller's shipping terms
  - Advertise whether a marketplace seller charges sales tax

2. If a state establishes an economic nexus threshold for requiring collection of sales/use tax, does it clearly indicate when that threshold is met, triggering a registration obligation, with respect to a marketplace seller, marketplace facilitator, or referrer? Should states consider a sales volume economic nexus threshold, without an alternative separate number of transactions threshold, or include both sales volume and separate number of transactions in the threshold?

Example: A requirement to collect and remit sales tax should exist only when the marketplace facilitator facilitates sales volume of more than \$100,000 in the state in

**Commented [HD(6)]:** If we had our way, we would get rid of the referrer concept altogether if the intent of it is to enforce a collection obligation on the referrer. As noted above, there is really no way for a referrer to collect on a sale from a referral. There may be some benefit from receiving the reports from referrers if they are required to do notice and reporting, but we're unsure if the administrative costs outweigh the benefit.

**Commented [HD(7)]:** Would prefer if our statute tied the compensation to receiving a commission, fee, etc. for a specific sale, similar to Pennsylvania's definition, rather than to simply listing the product for sale.

**Commented [HD(8)]:** Would prefer if the definition clarified that the purchaser had to be taken directly to the specific product page for that item on the seller's site; ambiguous whether this means to seller's general site or to the specific product page.

**Commented [HD(9)]:** This carve out has caused a lot of confusion from potential referrers. We would prefer not to have the carve out. If it has to stay, we would like the legislature to clarify whether the referrer must actively provide the shipping/tax information to not meet the carve out, or whether simply passing on information such as free shipping or no tax from a seller advertising on the referrer's platform is enough not to qualify for the carve out.

**Commented [WA(10R9)]:** Also, does specifically calling out "internet" advertising implicate ITFA issues?

**Commented [HD(11)]:** What is this based on? Gross retail sales (as in WA), taxable sales, wholesale and retail sales, etc.?

Are the facilitator's own receipts included in this calculation, or is it just the receipts from third-party seller sales?

the prior calendar year and 200 or more separate transactions in the state in the prior calendar year.

3. **Are registration and return filing requirements in conflict or duplicative? If the marketplace facilitator is required to register, collect and remit the sales/use tax on facilitated sales, then is there a need for the marketplace seller to register or report those same sales?**

One of the administrative savings from states requiring marketplace facilitators to register, collect and remit sales/use tax should be elimination of the need to register the large volume of marketplace sellers. If marketplace seller is making direct sales or using other marketplace facilitators that are not collecting, the marketplace seller may have a registration, collection and remittance obligation. Should the marketplace seller and facilitator have the option to agree on which party will register, collect and remit the sales/use tax?

A multichannel retailer may have a brick and mortar store, make direct online sales, use one or a marketplace facilitators or referrers, or itself act as a marketplace facilitator or referrer. The state should establish clear rules for determining the multichannel retailer's registration, collection and remittance responsibilities, so as to avoid conflicting or duplicative requirements.

Example (New Jersey): a marketplace facilitator shall not be required to collect and pay the tax imposed under [statutory cite omitted] on a retail sale if the marketplace seller for whom the retail sale is facilitated holds a certificate of registration pursuant to [statutory cite omitted] and provides a copy of the certificate of registration to the marketplace facilitator prior to the retail sale. Nothing in this subsection shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into an agreement with each other regarding the collection of the tax imposed under [statutory cite omitted] .

4. **Should the person registering, collecting, remitting tax and filing returns be the person that the state should audit and require compliance with the state's record keeping requirements?**

Example (New Jersey): Upon the request of the director, a marketplace facilitator shall demonstrate compliance with the provisions of [statutory cite omitted]. A marketplace facilitator otherwise shall not be subject to audit by the department

**Commented [HD(12)]:** Why not prior or current year?

If you choose current year, then what happens when the threshold is met mid-year? WA DOR has decided that facilitator should start collecting on the first day of the calendar month that is at least thirty days from the date on which the threshold is met (so if t/p hits threshold on October 15, then need to start collecting on December 1).

**Commented [HD(13)]:** WA DOR has gone with an "or" approach rather than an "and" approach. WA went in this direction because it was permitted by the legislature in RCW 82.32.733(3)(a) to impose a sales/use tax obligation on remote sellers, referrers, and marketplace facilitators to the fullest extent allowed under state and federal law. The South Dakota standard upheld in *Wayfair* was the furthest extent allowed under federal law, so we adopted the same approach.

**Commented [HD(14)]:** What specifically is a transaction? For instance, if a purchaser buys five products from five different sellers on a facilitator's site, is that five transactions or one?

**Commented [HD(15)]:** We do not make marketplace sellers who only sell through a marketplace register until they meet the retailing business and occupation tax threshold of \$285,000; remote sellers making direct sales and exceeding the dollar or transaction threshold will have to register. If remote sellers are registered but selling through a facilitator, then can claim a sales tax deduction for sales made through the marketplace.

**Commented [HD(16)]:** Would make auditing businesses difficult; WA has not gone in that direction, and instead makes the facilitator liable for collecting the tax. Thus, for multichannel retailers with a brick and mortar presence also selling through a facilitator, we have consistently said that such retailers must report their facilitated sales and claim a deduction for those sales on their combined excise tax return. With that, we've tried to avoid any duplicative/conflicting requirements.

**Commented [HD(17)]:** Yes. WA DOR has the authority to audit anyone who is registered and collecting; even if sellers are not collecting and selling wholly through a facilitator, we would still audit sellers for B&O tax purposes.

with respect to the retail sales for which it is required to collect and remit the tax imposed under [statutory cite omitted]. Nothing in this subsection shall preclude the department from auditing a marketplace seller with respect to retail sales facilitated by a marketplace facilitator on the marketplace seller's behalf.

Example (Alabama): Marketplace facilitators that collect simplified sellers use tax under this section shall report and remit the tax in accordance with [statutory cite omitted], and shall maintain records of all sales delivered to a location in Alabama, including copies of invoices showing the purchaser, address, purchase amount, and simplified sellers use tax collected. Such records shall be made available for review and inspection upon request by the department.

**5. Should states imposing a sales volume-based economic nexus threshold for sales/use tax collection also consider adopting an economic—or factor presence--nexus threshold for income tax?**

Marketplace sellers or marketplace facilitators that exceed the state's economic nexus threshold for sales/use tax may have remaining uncertainty about whether they will be subject to the state's income tax. Given the narrow profit margins that smaller marketplace sellers may operate within, they may exceed the state's economic nexus threshold for sales/use tax and still have minimal, if any income tax liability. The obligation to file income tax returns in a state, even if the tax liability is minimal, can be a considerable expense for the marketplace seller. States may want to consider adopting a higher sales-volume economic nexus threshold for income tax. Also, a small marketplace seller using a marketplace facilitator in the state may have inventory located in the state. Should states consider establishing a de minimis property income tax nexus threshold, so that if the marketplace seller's only property in the state is a small amount of inventory, it could fall below that de minimis level?

Example: The MTC "factor presence" nexus standard for business activity taxes provides that substantial nexus will exist if the taxpayer has any one of the following: at least \$500,000 in sales, \$50,000 in property, \$50,000 in payroll, or 25% or more of total property, sales, or payroll in the state. Those thresholds are periodically adjusted for inflation.

**Commented [HD(18)]:** While WA does not have an income tax, WA's B&O tax has a factor presence-nexus standard for so-called apportionable activities (most non-retail services fall under this category). For retailing, WA's B&O tax has a \$285,000 receipts threshold for remote sellers, but does not use a property or payroll threshold (because physically present sellers are required to report retailing B&O regardless of meeting any threshold).

**Commented [HD(19)]:** This is a concept WA has not explored yet. We have a property threshold (currently \$57,000) for non-retailing activities. For retailing activities, however, the inventory would establish nexus for B&O purposes. If we were to apply the property threshold here, we would want to consider how to calculate the value of the inventory for this threshold. Under our current law, WA DOR may require the averaging of monthly values during the calendar year if reasonably required to properly reflect the average value of the taxpayer's property in this state throughout the taxable period. Under that standard, it is likely that few smaller sellers with inventory in the state would exceed the property threshold. For instance, even if a seller had \$57,000 in inventory on January 1, if on December 31 the seller had \$1,000 in inventory, we would take the value of the inventory in the beginning of the year and the value at the end of the year, add them together, and divide by two (so  $\$57,000 + \$1,000 / 2$ ). This equals \$29,000, so it would be below our threshold.

We would also want to ensure that sellers could track the value of inventory in the state so it works for them administratively.

6. **Should states strive to simplify the registration process and require the minimum information necessary from the marketplace seller or facilitator?**

**Commented [HD(20)]:** Yes. WA permits this currently by allowing registration either through our business licensing system or SSUTA.

Examples: Foreign companies need to be able to register without an FEIN or SSN. States should consider eliminating requirements for remote marketplace sellers to register with the secretary of state, if such requirements exist.

7. **States should provide liability protection to marketplace facilitators when errors in collection and remittance are due to marketplace seller providing erroneous information to the marketplace facilitator?**

**Commented [HD(21)]:** Agreed. WA has this in its law and it seems like a good policy to allow facilitators and sellers to get up-to-speed on complying with the new collection regime.

Example (Oklahoma): A marketplace facilitator or a referrer is relieved of liability under subsection B of this section if the marketplace facilitator or the referrer can show to the satisfaction of the Commission that the failure to collect the correct amount of tax was due to incorrect information given to the marketplace facilitator or the referrer by a marketplace seller or remote seller.

8. **Should states include statutory provisions concerning protection of collecting marketplace facilitators against the risk of class action lawsuits?**

**Commented [HD(22)]:** Yes, WA has this as well.

Example (Oklahoma): A class action may not be brought against a marketplace facilitator or a referrer on behalf of purchasers arising from or in any way related to an overpayment of sales or use tax collected by the marketplace facilitator or the referrer, regardless of whether such action is characterized as a tax refund claim. Nothing in this subsection shall affect a purchaser's right to seek a refund from the Commission pursuant to [statutory cite omitted].

Additional issues:

- How should remote sellers/facilitators handle sales to exempt persons/entities? For instance, for tribal members purchasing products in their Indian country, those sales are exempt in WA, but how should sellers/facilitators handle those transactions?
- Should states clarify the extent that physical presence is still a relevant inquiry in determining substantial nexus?
- How should states handle foreign sellers' sales through the marketplace facilitator?